

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN WAYNE LAPORTE,

Defendant-Appellant.

UNPUBLISHED
December 11, 2003

No. 241562
Saginaw Circuit Court
LC No. 01-020485-FC

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant John Laporte appeals as of right his jury trial convictions of five counts of CSC I,¹ one count of CSC II,² and one count of third-degree fleeing and eluding.³ The trial court sentenced Laporte to 30 to 50 years' imprisonment for the five counts of CSC I; 168 to 270 months' imprisonment for CSC II; and 24 to 90 months' imprisonment for fleeing and eluding, with all counts to run concurrently. We affirm.

I. Basic Facts And Procedural History

SL testified that the first time Laporte, her father, had sex with her was in late October of 2000, when she was thirteen years old. Laporte called SL at school and ordered her to come home to change her mentally impaired seven-year-old twin brothers' diapers. SL told him that he would have to tell the school that she had a doctor's appointment before they would let her leave. Laporte told the school that SL had a doctor's appointment but that she would be back later. SL was excused and walked home.

SL testified that when she got home she asked Laporte where her brothers were; he replied it was not important and asked her to have sex with him. Laporte then locked the front door with a key and went into the computer room and retrieved a condom out of the printer. According to SL, Laporte put the condom on and asked her to just try it once and if she did not like it she would not have to do it again. SL claimed she was sitting on the couch in the living room and said no. Laporte then threatened to hit her and ground her if she did not try it.

¹ MCL 750.520b(1)(b).

² MCL 750.520c(1)(b).

³ MCL 750.497a(3).

Laporte then pushed the “play” button on the VCR and a “sex tape” began playing. SL said the videotape depicted a number of ladies and men having sex together at the same time. According to SL, Laporte sat on her, placed his penis in her mouth, and told her to suck it. Then, again according to SL, Laporte put her legs on the couch and unzipped her pants, pulled them down, straddled her, and put his penis into her vagina as she lay on her back. According to SL, after Laporte finished, he flushed the condom down the toilet, and she went upstairs to her room crying and did not return to school.

However, SL had told a counselor on July 5, 2001, that the first time Laporte had sex with her was on “picture day” in the spring. Later during the same interview, SL said the first time Laporte had sex with her was after Halloween but before Thanksgiving. SL told the counselor that she “tried to push him off me, but he was squishing me to the front room couch.”

SL testified that Laporte continued to have sex with her almost every night after her mother, Brenda Laporte, went to work. According to SL, Brenda Laporte worked the night shift at that time, from 10:30 p.m. to 7:00 a.m. SL testified that Laporte would keep her up until 3:00 a.m. or 4:00 a.m. to cook his dinner. SL said that most nights while she was fixing her hair Laporte would call her to come to him and then ask her to scratch his back, massage his feet and legs, or rub his testicles. This was usually followed by oral sex and vaginal intercourse.

SL also testified that on either July 1 or July 2, 2001, while her mother was at work, Laporte started “feeling her butt” and asked her to “rub his balls,” and SL said no. SL testified that Laporte had been drinking and he threatened to ground her and beat her unless she submitted. SL testified that she began to cry but did as Laporte requested. According to SL, Laporte pulled down his pants and, taking her hand, placed it in his shorts on his testicles. She rubbed his testicles and penis and then he told her to lie down, at which point he put his penis in her mouth, then in her vagina. SL testified that Laporte threatened to kill her and her family if she told. Afterward, she claimed, Laporte flushed the condom and the wrapper down the toilet.

SL also testified that on July 5, 2001, Laporte called her into what was referred to as the “bar room” and asked her to scratch his back. SL began scratching his back and Laporte showed her a condom wrapper and asked her if she wanted to have sex with him. SL said no and claimed that Laporte threatened to ground her unless she complied. SL said, “so” and as she turned to walk away he grabbed her.

SL testified that Laporte was wearing a condom and had put some “hot action gel” on the condom. She said that he had put the condom on before she had come back out to scratch his back. According to SL, Laporte had been drinking and grabbed her around the waist, unzipped her pants and pulled them down along with her underwear, then bent her over a blue, Playschool chair and entered her vaginally from behind with his penis. SL testified that while Laporte was having sex with her, he untied her bathing suit top and began rubbing her breasts. SL stated that she banged on the wall several times to get her brothers’ attention in the next room. She stated that Laporte told her to stop banging on the wall, otherwise the boys would come out. Instead, she banged on the wall again and Laporte moved her away from the wall.

SL testified that NL, her older brother, walked in while Laporte was having sex with her, and saw them having sex. According to SL, NL yelled, “You’re sick,” at Laporte, jumped out a window, and ran to a friend’s house. NL testified that he saw SL bent over a blue chair with Laporte standing directly behind her and it looked like they were having sex. NL said that all he

saw was skin below the waist on both and no pants on either of them or even around their ankles. NL explained that he jumped out the window to get out of the house because the front and back door have dead-bolt locks that can only be opened by using a key. NL testified that SL did not like staying up late but that Laporte forced her to do so. NL said it was not unusual for SL to make Laporte dinner after midnight. When asked why Laporte made SL stay up late, NL stated, “[T]o massage his feet and rub them and stuff.”

According to SL, after NL jumped out the window, Laporte jumped up and got dressed, flushed the condom down the toilet, and yelled at her that this was all her fault and he would have to call her mother. SL claimed that Laporte told her to go talk to NL. SL left the room and went out onto the porch and lay on the couch crying. SL said she was lying on the couch for approximately half an hour when she heard Laporte calling her name and she heard her mother walk into the house. SL heard her mother yelling at Laporte, “saying that you’re sick and all this stuff and they should have kept you in prison a long time ago.”

Brenda Laporte testified that Laporte called her at work and told her there was an emergency at home and that she had to come home immediately. According to Brenda Laporte, when asked, Laporte would not tell her what the emergency was but only repeated that she had to come home now. Brenda Laporte drove home and when she found Laporte in the kitchen, he told her to have a seat because she was not going to like what he had to say. According to Brenda Laporte, Laporte told her that he had had sex with SL, that SL “was nothing but a little whore,” and that NL had seen them. Brenda Laporte testified that, after Laporte’s admission, she began crying and got up to find SL and NL. Brenda Laporte claimed she found SL huddled in a ball on the couch crying.

According to NL, after he jumped out the window, he ran to a friend’s house. Debbie Cline, the friend’s mother, testified that NL was obviously upset when he arrived because he was crying and shaking when he told Cline that he saw his father having sex with his sister. According to Brenda Laporte, she heard Cline pull up in the driveway and went out to meet her. Cline asked her if she wanted the police called and Brenda Laporte said yes.

Cline called the police, who told her to stay there and call them back if anyone left the home. Cline told Brenda Laporte the police were on their way and Brenda went in and told Laporte, “You’re fucked, John, because [NL] went and called the police. They’re on their way.” According to Brenda Laporte, Laporte got dressed, grabbed his helmet and left the house on his motorcycle. Cline testified she called the police back and advised them that Laporte had left on his motorcycle.

Saginaw Police Officer Anthony Teneyuque testified that he was dispatched to the Laporte home and while en route was advised by radio that Laporte had left the residence on a motorcycle. A motorcycle had just passed Officer Teneyuque so he turned around; when he caught up with the motorcycle, he activated his patrol car’s overhead lights. Instead of stopping, Laporte turned onto another street and accelerated. Officer Teneyuque then activated his patrol car’s sirens and pursued Laporte. Officer Teneyuque testified that Laporte lost control of his motorcycle on a curve and flipped the motorcycle before coming to a stop in the middle of the road. Officer Teneyuque noted that Laporte was unconscious when he reached him. Laporte was taken to the hospital, where he was treated and released.

ML, Laporte's son who was fifteen years old at the time of the incident, testified that SL's bedroom was upstairs and she shared it with her younger sister, although sometimes SL slept on the couch. ML said that in "all the time when we had to go to bed, I never seen her come upstairs." ML explained that he was never up on a school night when Laporte made SL stay up. ML also testified that he would hear SL tell Laporte that she wanted to go to bed and he would not let her. ML said that, on the weekends when he was permitted to stay up, he saw SL making dinner for Laporte at 1:00 a.m. or 3:00 a.m. in the morning. ML also testified that he had observed SL scratching Laporte's back and massaging his feet and legs.

Jeffrey Territo, M.D., an emergency room physician at Covenant Hospital, performed a vaginal examination of SL and testified that there were no signs of bruising or redness, but that he would not expect to find these signs in a woman who had been having sexual intercourse for almost a year. He also stated that SL's hymen was not intact but that this was not necessarily because she was sexually active but, rather, could be due to her menstruating.

Christine Henne, a registered nurse and certified sexual assault nurse examiner at Covenant Hospital, completed a criminal sexual assault kit July 5, 2001, on SL while Dr. Territo supervised. Henne also interviewed SL, who told her that her father had made her perform oral sex on him then he had had sex with her while standing up. SL also told Henne that Laporte had rubbed SL's chest while having sex with her. Henne testified that SL did not go into any more detail because she was very upset about having to talk about what happened to her again. Henne stated, "We saw no trauma, no injury whatsoever, but that's not unusual in a sexual assault victim, especially if they have estrogen on board." Contrary to Territo's testimony, Henne explained that SL's hymen was intact, which did not necessarily mean that she had not been sexually active for the past year, because SL had started menstruating, and once women begin menstruating the hymen becomes more elastic, allowing sexual intercourse without the tearing of the hymen.

Detective Timothy Fink testified that SL said that the condom package Laporte flushed down the toilet said "Bare Skin." Detective Fink recovered three individually packaged condoms from the printer and one was labeled "Bare Skin Extra Thin." Detective Fink also recovered a sex tape from Laporte's closet consistent with SL's description of the tape Laporte made her watch in October of 2000.

Michigan State Police forensic scientist David Stephens testified that he conducted the tests on the criminal sexual assault kit from SL. Stephens testified he found no semen on Laporte's shorts or SL's underwear. Stephens stated the absence of semen would indicate there was a barrier, such as a condom, or that Laporte did not ejaculate. Stephens explained that it is not unusual to find no evidence of semen in sexual assault cases and "finding semen or not finding semen, doesn't really, for me, tell whether or not a rape occurs, because there are many factors to a rape."

Michelle Lee, SL's foster mother, testified that SL had been placed with her after the incidents and had been staying with her just over six months. Lee said that when SL first came to stay with her she had trouble sleeping, she was angry, and she cried a lot. Lee said that SL would tell her that she had nightmares about her father in her bedroom. Lee stated that because of SL's mood swings and overall depression, she was then taking Paxil, an anti-depressant.

II. CSC I And II

A. Standard Of Review

Laporte argues that plaintiff failed to prove the first element of CSC I, that he engaged in sexual penetration with his daughter.⁴ Sexual penetration “means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body . . . but emission of semen is not required.”⁵ This Court is required to determine if the evidence, viewed in a light most favorable to the prosecution, was sufficient to show that the essential elements of the crime were proved to a rational trier of fact beyond a reasonable doubt.⁶ “The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.”⁷

B. CSC I

Due process requires that a prosecutor present evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt.⁸ It is the trier of fact’s role to determine the weight of the evidence or the credibility of the witnesses.⁹ Here, based on SL’s testimony, her brother’s testimony about witnessing Laporte having sex with SL, and her mother’s testimony that Laporte admitted he had sex with SL, there was sufficient evidence for a jury to conclude that sexual penetration occurred. Because all credibility choices and reasonable inferences are drawn in support of the jury verdict, we conclude that reversal is not warranted.¹⁰

C. CSC II

To prove that a defendant committed CSC II, the prosecutor is required to show that the defendant engaged in sexual contact with another and that person is between the ages of thirteen and sixteen and is a member of the same household or related by blood.¹¹ “Sexual contact” is “the intentional touching of the victim’s or actor’s intimate parts . . . if that touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose”¹² Here, Laporte was in the act of sexual intercourse with his daughter when he untied her bikini top and began rubbing her breasts. A reasonable juror could construe from Laporte’s position at the time he was rubbing his daughter’s breasts that he was doing so for sexual gratification.

⁴ MCL 750.520b(1)(b).

⁵ MCL 750.520a(1)(o).

⁶ *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000).

⁷ *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

⁸ *People v Breck*, 230 Mich App 450, 456; 584 NW2d 602 (1998).

⁹ *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992).

¹⁰ *Wolfe*, *supra* at 514.

¹¹ MCL 750.520c(1)(b).

¹² MCL 750.520a(1)(n).

III. Mistrial

A. Standard Of Review

Laporte argues the trial court erred by refusing to grant his motion for a mistrial. We review a trial court's decision to grant or deny a mistrial for an abuse of discretion.¹³

B. Legal Standards

"A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way."¹⁴ Volunteered and unresponsive answers to proper questions are generally insufficient for granting a mistrial.¹⁵ Here, when the prosecutor asked, "What happened next?" SL replied she heard her mother yelling at Laporte, "that you're sick and all this stuff and they should have kept you in prison a long time ago."

Because the isolated comment was made on the first day of a trial spanning eight days, we conclude that it is unlikely that Laporte suffered significant prejudice. In addition, Laporte waived any error by informing the trial court that he did not want a curative jury instruction. A defendant may not waive his right at trial to a curative jury instruction and then raise it as an issue on appeal because his waiver extinguishes any error.¹⁶

IV. Prosecutorial Misconduct

A. Standard Of Review

Claims of prosecutorial misconduct are reviewed de novo to determine if the defendant was denied a fair trial and impartial trial.¹⁷ Laporte did not object to questions on direct examination or to the prosecutor's comments during closing argument. Therefore, this issue was not preserved for appeal.¹⁸ To avoid forfeiture of this unpreserved issue, Laporte must demonstrate a plain and obvious error that affected his substantial rights.¹⁹ No error requiring reversal will be found if the prejudicial effect could have been cured by a timely instruction.²⁰ Appellate review of unpreserved claims of error is disfavored.²¹

¹³ *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

¹⁴ *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992).

¹⁵ *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

¹⁶ *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

¹⁷ *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

¹⁸ *People v Carines*, 460 Mich 750, 762; 597 NW2d 130 (1999).

¹⁹ *Id.* at 763.

²⁰ *People v Schutte*, 240 Mich App 713, 720-21; 613 NW2d 370 (2000).

²¹ *Carines*, *supra* at 763.

B. The Trial Court's Instruction

Laporte argues several instances of alleged prosecutorial misconduct. To the extent the challenged testimony could be considered improper, we conclude that the trial court's instructions to the jury that the lawyer's comments were not evidence and that they were not to be influenced by sympathy was sufficient to cure any prejudice.²² Juries are presumed to follow their instructions.²³ Because there was no error, Laporte is not entitled to relief.

V. Ineffective Assistance Of Counsel

A. Standard Of Review

Laporte argues defense counsel was ineffective for failing to object at sentencing to the scoring of OV 13 and OV 19. To prevail on a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness and that the representation so prejudiced him that it deprived him of a fair trial.²⁴ Generally, unpreserved scoring challenges are not subject to review but here, because Laporte framed his scoring challenges as claims of ineffective assistance of counsel, this Court will review the issue.²⁵

B. The Scoring Instructions

The instructions provide for the scoring of 50 points for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person . . . less than 13 years of age."²⁶ Because SL was 13 years of age at the time of the offenses, OV 13 was improperly scored.

Laporte also argues the trial court erred in scoring 15 points under OV 19 for threatening to kill SL if she went to the police. Under OV 19, fifteen points are scored if "[t]he offender used force or threat of force against another person . . . to interfere with or attempt to interfere with the administration of justice."²⁷ Interfering or attempting to interfere "with the administration of justice [] involves an effort to undermine or prohibit the judicial process by which a civil claim or criminal charge is resolved."²⁸

Here, because Laporte threatened to kill SL if she went to the police, there was a crime of extortion, not an obstruction of justice.²⁹ As this Court explained in *People v Peña*,³⁰ extortion

²² *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

²³ *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

²⁴ *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

²⁵ *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001).

²⁶ MCL 777.43(a).

²⁷ MCL 777.49(a).

²⁸ *People v Deline*, 254 Mich App 595, 597; 658 NW2d 164 (2002).

²⁹ *Id.*

“punishes coercive behavior directed against individuals, regardless of whether such behavior occurs in the context of interfering in the orderly administration of justice.”³¹ By contrast, obstruction of justice is concerned with the interference in the orderly administration of justice, which is a crime against the public.³² Therefore, OV 19 was improperly scored.

The combined errors lower the total OV score from 110 points to 95 points, thus changing the enhanced sentencing guideline range from F-VI to F-V, which is 225 months to 468 months. Nevertheless, 360 months is well within the corrected sentencing guidelines, and therefore, Laporte has failed to establish prejudice.³³ Laporte is also unable to establish that his representation fell below an objective standard of reasonableness because there was no showing that the trial court would have sentenced him to a lesser sentence had the minimum sentence guidelines been correct.³⁴ Because Laporte has failed to prove both prejudice and that his representation fell below an objective standard of reasonableness, we conclude that he was not denied a fair trial and was effectively represented.³⁵

With regard to the underlying scoring errors, when the issue is unpreserved, as here, the defendant forfeits the issue.³⁶ However, forfeiture does not extinguish plain error.³⁷ “Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings” independent of the defendant’s innocence.”³⁸ Here, we conclude that Laporte has failed to demonstrate plain error affecting his substantial rights or that he was actually innocent of the crimes.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio

(...continued)

³⁰ *People v Peña*, 224 Mich App 650, 656; 569 NW2d 871 (1997).

³¹ *Peña, supra* at 656.

³² *Id.*

³³ *Pickens, supra* at 338

³⁴ *Price, supra* at 547.

³⁵ *Pickens, supra* at 338

³⁶ MCR 6.429(c).

³⁷ *Carter, supra* at 215.

³⁸ *Carines, supra* at 763, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).